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Ramirez v. State Respondent's Brief Dckt. 41341

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

RAMIRO R. RAMIREZ,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

No. 41341

Jerome Co. Case No.
CV-2012-398

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF JEROME

HONORABLE JOHN K. BUTLER
District Judge

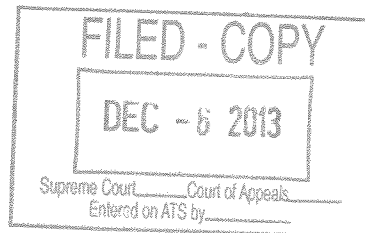
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STATEMENT OF THE CASE

Nature Of The Case

Ramiro R. Ramirez appeals from the summary dismissal of his petition for post-conviction relief and denial of his request for counsel.

Statement Of The Facts And Course Of The Proceedings

Ramirez filed a petition for post-conviction relief attacking his burglary conviction, specifically challenging the “[s]ufficiency of the evidence” and asserting a claim of “[i]neffective assistance of appellate counsel.” (R., pp., 3-6.) In his affidavit Ramirez asserted that his appellate counsel “ignored issues that are clearly stronger” than the issues raised on appeal, including “denial of ... motion regarding identification.” (R., p. 8.) He also filed a motion for appointment of counsel. (R., pp. 79-81.)

The district court entered a notice of intent to dismiss and a denial of the motion for counsel absent a showing that the petition was not frivolous. (R., pp. 83-99.) The district court took judicial notice of the appellate transcript and the order entered in the criminal case denying the motion to suppress evidence. (R., p. 85.) In relation to the latter, the court found no basis for an appellate challenge to the factual finding there had been no out-of-court identification by the victims, and therefore no out-of-court identification evidence to suppress. (R., pp. 93-95.)

Ramirez responded. (R., pp. 105-16.) He reasserted that the evidence was insufficient to support his identification as the perpetrator (R., pp. 106-09) and that his appellate counsel was ineffective for failing to raise issues regarding

the sufficiency of the evidence to support a finding of identity (R., pp. 110-11). He did not assert that the victims had made an out-of-court identification; rather, it was the lack of such evidence he contended rendered the evidence insufficient. (R., pp. 106-16.) The district court dismissed the petition. (R., pp. 117-28, 131.) Ramirez filed a notice of appeal timely from the entry of judgment. (R., pp. 133-36.)

ISSUE

Ramirez states the issue on appeal as:

Whether the district court erred by summarily dismissing the petition for post conviction relief and/or whether it erred by dismissing it without appointing counsel.

(Appellant's brief, p. 4.)

The state rephrases the issue as:

Has Ramirez failed to show error in the district court's conclusion that Ramirez failed to demonstrate the possibility of a valid post-conviction claim?

ARGUMENT

Ramirez Failed To Demonstrate The Possibility Of A Valid Post-Conviction Claim

A. Introduction

The district court concluded that the petition was frivolous and denied the motion for appointment of counsel. (R., pp. 88-89.) The motion to suppress evidence of a suggestive out-of-court identification filed in the criminal case was denied based on the factual finding that the eyewitnesses did not make any out-of-court identification, and therefore there could have been no due process violation from a suggestive out-of-court identification. (R., pp. 94-95.) Ramirez had failed to establish any basis for believing that appellate counsel's performance had been either deficient or prejudicial for not challenging that ruling on appeal. (R., p. 95.)

Ramirez contends the district court misconstrued the evidence subject to the suppression motion, and therefore reached an erroneous decision regarding the viability of his claim that appellate counsel should have challenged the denial of his motion to suppress identification evidence. (Appellant's brief, pp. 13-16.) Ramirez's argument does not withstand analysis. Specifically, his claim that identification of clothing, the vehicle used in the burglary, and certain physical characteristics of the burglars are subject to the same due process requirements as an out-of-court identification that he was one of the burglars is meritless.¹

¹ A post-conviction claim is properly dismissed if the petitioner fails to present evidence sufficient to show a material issue of fact on which relief can be granted. Workman v. State, 144 Idaho 518, 522-23, 164 P.3d 798, 802-03 (2007). Because this is a higher burden than demonstrating the possibility of a valid claim necessitating the appointment of counsel, Judd v. State, 148 Idaho

B. Standard Of Review

Denial of counsel in a post-conviction proceeding is reviewed for an abuse of discretion. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). “In reviewing the denial of a motion for appointment of counsel in post conviction proceedings, ‘[t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.’” Charboneau, 140 Idaho at 792, 102 P.3d at 1111 (quoting Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001)).

C. Ramirez Was Not Entitled To Post-Conviction Counsel To Pursue A Claim That His Appellate Counsel Was Ineffective For Not Presenting An Argument Lacking Factual Or Legal Support

Post-conviction counsel should be appointed if the petitioner qualifies financially and “alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim.” Swader v. State, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007); see also Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). To establish a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307

22, 24, 218 P.3d 1, 3 (Ct. App. 2009), Melton v. State, 148 Idaho 339, 345, 223 P.3d 281, 287 (2009), the remainder of the Respondent’s brief will focus on the “possibility of a valid claim” standard on the assumption that if Ramirez did not show entitlement to counsel the dismissal of his claims is proper, but that if he did show entitlement to counsel then dismissal without the opportunity of counsel to appear was error.

(1989). This two-prong test for ineffective assistance of trial counsel also applies to claims of ineffective assistance of appellate counsel. Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010) (citing Mintun v. State, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007)).

Ramirez failed to show even the possibility of a valid claim of ineffective assistance of appellate counsel for not challenging the denial of the motion to suppress. As noted by the district court, the motion to suppress an out-of-court identification was denied in the trial proceedings because the two victims did not make an out-of-court identification of the perpetrators of the burglary, but only provided evidence regarding their vehicle, clothing, and general physical characteristics. (R., pp. 94-95.) Although an “out-of-court identification” may be so suggestive as to violate due process, State v. Almaraz, 154 Idaho 584, ___, 301 P.3d 242, 251 (2013), there was no out-of-court identification made in this case. Appellate counsel was not ineffective for failing to challenge the denial of a motion to suppress an out-of-court identification that was in fact never made.


Ramirez contends the district court was “just wrong” when it concluded the witnesses did not identify him as a perpetrator because their description of the car, clothing and physical characteristics of the burglars tended to identify him as a perpetrator. (Appellant’s brief, p. 15.) This argument is mere sophistry, conflating without any legal basis an “out-of-court identification” of the defendant as the perpetrator of the crime and evidence tending to show the identity of the perpetrator. Ramirez cites to no court that has extended procedures such as non-suggestive lineups, applicable to out-of-court identifications, to a witness’

identification of clothing, a car, or other items or characteristics associated with the perpetrator of a crime. What a "hoodie line-up" or a photo array of shaved heads or sedans would even look like is a mystery, and certainly not required by due process. Ramirez' argument that a witness would have to identify physical evidence such as clothing, a tattoo, height, or a shaved head (or by extension a fingerprint, DNA, or other evidence of identity) out of a non-suggestive lineup or photo array simply because the evidence is relevant to identity is devoid of support in the law. Therefore, the performance of his appellate counsel for choosing not to make such an argument was not deficient and Ramirez was not prejudiced on appeal. Ramirez was not entitled to appointment of an attorney at taxpayer expense to pursue a claim his appellate counsel was ineffective for failing to raise an argument devoid of legal support.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying counsel and the summary dismissal of the petition for post-conviction relief.

DATED this 6th day of December, 2013.


KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of December, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG S. SILVEY
Silvey Law Office, Ltd.
PO Box 565
Star, Idaho 83669

A handwritten signature in dark ink, appearing to read 'Kenneth K. Jorgensen', written over a horizontal line.

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm